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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSOCIATION, INC.,
Petitioner,

v.

C. ED CARRITHERS AND
ROBERT G. COULTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

ROBERT M. MOORE
(Counsel of Record)
ROBERT M. MOORE & ASSOCIATES
7511 Broadway
Galveston, Texas 77551

Attorneys for Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Whether Congress' Commerce Clause authority over navigable waters precludes a private property owner from granting an easement of use and control in a privately financed and developed turning basin.

2. Whether a Texas Supreme Court ruling that the State takes free of easements to privately developed navigable waterways quitclaimed to the State, is a taking under the Fifth Amendment requiring the payment of just compensation to the easement owner.

LIST OF PARTIES

All parties to this proceeding in the Texas Supreme Court are named in the caption.

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C. ED CARRITHERS AND
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Terramar Beach Community Improvement Association, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas entered in this case on January 5, 1983.

OPINIONS BELOW

The opinion of the state district court is unreported. However, that court's findings of fact and conclusions of law are reprinted herein as App. C (12a). The opinion of the Court of Appeals for the First Supreme Judicial

District of Texas, Houston, Texas, is reported at 630 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1982) and is reprinted herein as App. B (6a). The opinion of the Supreme Court of Texas is reported in slip opinion form at 26 Tex. Sup. Ct. J. 172 (Jan. 8, 1983), a copy of which is reprinted herein as App. A (1a). A copy of the notice that the motion for rehearing was overruled is attached as App. H (34a).

JURISDICTION

The court below entered judgment on January 5, 1983. Petitioner's Motion for Rehearing was timely filed on January 17, 1983, and denied on March 9, 1983.

This Court has jurisdiction to review the judgment of the Texas Supreme Court by certiorari, pursuant to 28 U.S.C. § 1257(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 8, of the United States Constitution provides in pertinent part as follows:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The Fifth Amendment of the United States Constitution provides in pertinent part as follows:

> ". . . [N]or shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS INVOLVED

TEX. NAT. RES. CODE ANN. § 11.012 (Vernon 1978) provides in pertinent part as follows:

"(b) The State of Texas has full sovereignty over the water, the beds and shores, and the arms of the Gulf of Mexico within its boundaries . . . , subject only to the right of the United States to regulate foreign and interstate commerce under Article I, Section 8, of the United States Constitution, and the power of the United States over admiralty and maritime jurisdiction under Article III, Section 2, of the United States Constitution.

"(c) The State of Texas owns the waters and beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries . . . , including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide."

STATEMENT OF THE CASE

A. Terramar Beach Community Improvement Association, Inc., is a property owners association which represents the homeowners of Terramar Beach Subdivision, a privately developed community of waterfront and canalfront homes on Galveston Island, Texas.

Prior to any improvements thereof, the property on which the Terramar Beach Subdivision is now located was dry land bordering Galveston Bay and was originally owned by the HGC Development Corporation. In 1963, HGC carved out a network of canals and a turning basin from this land so as to create an extensive frontage for the construction of canalfront homes. The canals and turning basin were intended for the use of homeowners in the subdivision who owned boats. The "turning basin" was simply intended as an aquatic cul-de-sac to enable boats to reverse direction after entering or exiting one of the canals.

After the construction of the artificial canals and turning basin, but prior to further improvements of the property into saleable homesites, HGC went bankrupt. HGC conveyed the entire property to its trustee in bankruptcy who, in turn, conveyed the property to the 7500 Bellaire Corporation. Bellaire then proceeded to make the two conveyances giving rise to this controversy. In 1975, Bellaire granted an easement of the full, free and uninterrupted use of the turning basin, including the overlying waters, to one Cary White. White assigned all his rights under the easement to Terramar in 1977. Then in 1978, Bellaire conveyed the turning basin and canals to the State of Texas through a quitclaim deed, subject to the easement owned by Terramar.[1]

Carrithers and Coulter own a strip of property bordering the turning basin. This property was also acquired from Bellaire. The deed to Carrithers and Coulter expressly recited the fact that the conveyance was made subject to Terramar's easement to the turning basin.

In 1980, Coulter and Carrithers sought and obtained a permit from the United States Army Corps of Engineers to construct a private marina, including approximately 201 feet of bulkhead, a dock, a boat ramp, and three 60'x195' covered boat sheds.[2] The pier and boathouse

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1. Under Texas law, a quitclaim deed passes only the interest that the grantor has in the property at the time of executing and delivering the instrument. If the grantor's interest in the land is less than the fee, a quitclaim transfers to the grantee only the title or interest the grantor has and does not of itself establish title in those holding under it. *McMahon v. Fender*, 350 S.W.2d 239 (Tex. Civ. App.—Waco 1961, err ref'd n.r.e.); See also 19 Tex. Jur. 2d, *Deeds*, § 11 (Supp. 1982), and cases collected therein.

2. Both the permit and the Corps' rules and regulations upon which the permit was issued expressly provide that no property rights were conveyed by the permit itself: "Authorization of work or struc-

complex was to originate from the Coulter and Carrithers property, but was to be located primarily in the turning basin, anchored by pilings driven into the bottom of the turning basin.

Immediately after the issuance of the permit, Terramar sought and obtained a permanent injunction prohibiting Carrithers and Coulter from constructing the marina complex. The Texas Court of Civil Appeals affirmed the permanent injunction. However, the Texas Supreme Court has found the injunction to be invalid on the ground that Terramar's easement to the turning basin was invalid in light of state and federal sovereignty powers over navigable waters. The court held:

> "The exclusive right to control, impede or otherwise limit navigable waters in this state belongs to the governments of Texas and the United States. An individual landowner is without such a right. Thus, as grantor, the Bellaire Corporation could not give White (or Terramar as his assignee) the exclusive use of navigable waters which are owned by the State of Texas. We hold that a grant of the easement purporting to limit the use of navigable waters conflicts with the state and United States governments' sovereignty over such waters."

(Citing U.S. CONST. art. I, § 8; TEX. NAT. RES. CODE ANN. § 11.012(b) (Vernon 1978), 26 Tex. Sup. Ct. J. 173; See App. A, 3a.)

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tures by the Department of the Army does not convey a property right nor authorize any injury of property or invasion of other rights." 33 C.F.R. § 320.4(g) (1980). The permit itself provides: That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and, that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State or local laws and regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

B. The federal questions presented by this case were considered in the trial court, the Houston Court of Appeals and the Texas Supreme Court. In the trial court, Terramar's petition for injunction was premised upon its superior rights under the easement. A copy of the easement assigned to Terramar is reprinted herein as App. G (31a). The trial court entered findings of fact and conclusions of law which are reprinted herein as App. C[3] (12a). The trial court in its first conclusion of law found:

> "Even though the Defendants have obtained a permit for the construction of the improvements referred to in the Findings of Fact, the permit is not controlling since, although the permit may have been required by the Corps of Engineers, consent by the Plaintiff would also have been required since the underlying lands were not public lands, or if they had become public lands, the public's rights are subject to the Plaintiff's easement to the land beneath the water of the Turning Basin."

(App. C, 16a). The trial court then issued an order enjoining the construction of the marina to the extent it would intrude into the turning basin.[4]

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3. *See* Vernon's Tex. R. Civ. P. 296 (Supp. 1982).

4. The trial court's order permanently enjoined the Respondents from:

> (1) Digging or removing earth, sand, marl or in any way displacing same, blocking, filling in, driving pilings of any size or length into, anchoring into or on, dumping, dredging, or placing any permanent or stationary objects or appurtenances in or on the land area where the Plaintiff's exclusive easement exists;
>
> (2) Placing any objects on or over the surface waters of the "turning basin" where Plaintiff's easement exists which are in any way designed or meant to facilitate the temporary or permanent storage of boats, barges, boat ramps, docks or any facility which in any way blocks or impedes the full and complete

The Respondents appealed the trial court's injunctive order to the Houston Court of Appeals (1st Dist.). The Respondents raised nine points of error in their brief, all but one alleging, in various forms, the preemption of Terramar's right to prevent the project because of the superior authority over navigable waters of Congress under the Commerce Clause.[5] All nine of Carrither's and Coulter's points of error to the Court of Appeals are reprinted herein as App. E, 19a. The Court of Appeals affirmed the trial court's order granting the permanent injunction. The Court of Appeals found that the grant by the U.S. Army Corps of Engineers to the Respondents did not bestow upon them any property rights with respect to the submerged lands in the turning basin. *Carrithers v. Terramar Beach Community Improvement Association, Inc.*, 630 S.W.2d 648, 650 (Tex. App.—Houston [1st Dist.] 1981); see App. E, 19a.

The Court of Civil Appeals carefully delineated the rights of Terramar relative to those of the Respondents as private parties and the Court also delineated the rights of Terramar relative to those of the public. The Court of Appeals found that the injunction expressly recognized the rights of the general public to use the waters overlying the bed of the turning basin. 630 S.W.2d 648, 650. The court also found that the only rights in conflict were

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usage of the surface waters of the "turning basin" where Plaintiffs' easement exists;

(3) Obstructing or in any other manner impairing or interfering with the Plaintiff's exclusive easement.

The order further provides that it shall not be construed to limit or enjoin any person from using the waters of the turning basis for swimming, boating, fishing or water transportation.

5. Respondents' SEVENTH POINT OF ERROR was based on state sovereignty over navigable waters. See App. E, 19a.

those of *two private parties* and that there was no conflict between the rights of Terramar and the rights of the public, which the court found were protected by state and federal laws. 630 S.W.2d 648, 650.

The Respondents appealed the judgment of the Court of Appeals to the Supreme Court of Texas. The Texas Supreme Court granted a writ of error to consider eight of nineteen assignments of error alleged by Carrithers and Coulter in their Application for Writ of Error.[6] The main thrust of Respondents' argument was that Bellaire Corporation, as owner of the turning basin, was precluded by the Commerce Clause from granting any easements for the use of the turning basin because Congress alone had the exclusive authority to control the use of the turning basin.[7] The Respondents also argued that the turning basin "went public" upon its being submerged with navigable water and therefore all private property rights in the turning basin after submergence became totally subservient to the rights of the public in the use and control of the turning basin.[8] The Respondents further argued that the U.S. Army Corps of Engineers permit for the construction of the marina gave them rights superior to any of those held by Terramar in the turning basin.[9]

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6. The Texas Supreme Court granted the writ to consider assignments of error Nos. 1, 5, 8, 10, 12, 15, 17, and 19. These are reprinted herein as App. F, 26a. See Vernon's TEX. R. CIV. P. 476, 480, 483 (Supp. 1982) concerning the writ of error procedure in Texas.

7. See assignment of error Nos. 1, 5, 10, 12, and 17, App. F, 26a, 27a, 28a.

8. See assignment of error Nos. 10, 15, 17, and 19, App. F, 27a, 28a, 30a.

9. See assignment of error No. 12, App. F, 28a.

C. The Texas Supreme Court entered its opinion and judgment in this case on January 5, 1983.[10] The Texas Supreme Court held that "a grant of the easement purporting to limit the use of navigable waters conflicts with the state and United States governments' sovereignty over such waters". (26 Tex. Sup. Ct. J. 173; see App. A, 4a.) Having found the easement invalid, the court concluded that the title the state took by the 1978 quitclaim deed to the turning basin bed was unencumbered by the purported easement. Thus, construction of the marina was subject only to the securing of the approvals of the permitting agencies of the state and the United States. (slip op. p. 3; see App. A, 3a).

Terramar filed a timely Motion for Rehearing.[11] In its motion, Terramar sought to redirect the court's attention to two United States Supreme Court cases advanced by Terramar during oral argument to be controlling and dispositive of this case.[12] These cases expressly held, on facts identical to those in Terramar's case, that the owner of a privately developed artificial waterway, regardless of its characterization as "navigable," had the right to exclude the public from using those waterways absent condemnation and payment of just compensation by the government for a public right of way. The Texas Supreme Court denied Terramar's Motion for Rehearing without

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10. A copy of the court's slip opinion is reprinted herein as App. A, 1a. A copy of the court's judgment is reprinted herein as App. D, 17a.

11. See Vernon's Tex. R. Civ. P. 515 (Supp. 1982).

12. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and *Vaughn v. Vermilion Corporation*, 444 U.S. 206 (1979). These two cases were not discovered in time for inclusion in Terramar's written brief but were presented to the court for consideration during oral argument.

opinion on March 9, 1983. Thus, the first question now presented to this Honorable Court, whether Congress' Commerce Clause authority over navigable waters precludes a private property owner from granting an easement of use and control in a privately financed and developed turning basin, was squarely presented to and considered by the Texas Supreme Court, which found the answer to this question in the affirmative.[13]

The second question now presented to this Honorable Court, whether the Texas Supreme Court's ruling that the State took title free of any previously granted easements by the grantor-owner is itself a taking under the Fifth Amendment, was also presented to the Texas Supreme Court in Terramar's Motion for Rehearing.[14] Petitioner specifically asked the court in Petitioner's Motion for Rehearing to consider whether its holding, that the easement to the turning basin as a privately developed navigable body of water was *per se* invalid under state and federal

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13. Paragraph VI of Terramar's Motion for Rehearing states in pertinent part as follows:

> "The position that this Honorable Court has taken in Respondent's case is contrary to that taken by the United States Supreme Court in both *Kaiser Aetna, supra*, and *Vaughn, supra*."

14. Paragraph VIII of Terramar's Motion for Rehearing states in pertinent part as follows:

> "This Court has in effect said that any rights to use by private owners of submerged land below navigable waters are impossible. This interpretation would imply that once any property becomes submerged by navigable waters, the owner of that property loses any rights of use of his land. The Commerce Clause does not require this and to so hold would in itself be a violation of the Taking Clause in that all such landowners would effectively, if not actually, lose title to their property to the government, upon the property's submergence by, or development into, navigable water. This is in direct conflict with the Commerce Clause, the Taking Clause, and the Due Process Clause of the United States Constitution."

law, particularly the Commerce Clause, was in and of itself a taking without just compensation of private property for public use. By denying Terramar's Motion for Rehearing, the Texas Supreme Court has tacitly determined that it does not believe its prior decision in Petitioner's case amounts to an unconstitutional taking.

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court's judgment is squarely contrary to the decisions of this Court in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383 (1979), and *Vaughn v. Vermilion Corporation*, 444 U.S. 206, 100 S.Ct. 399 (1979). The exact issues in Petitioner's case have been previously considered and decided by this Honorable Court in these two cases. These cases are clear on the rights of a private developer of an artificial waterway. These cases hold that the owner of private property subsequently submerged by and connected with navigable waters through privately funded improvements, retains the right to control the use of these waters. Petitioner has never disputed the fact that this right is subject to being preempted by an exercise of government power in this area pursuant to the Commerce Clause. But Petitioner does contend (1) that his rights against other *private* parties are paramount and (2) that his rights against the government, while subject to preemption, are nevertheless protected from being taken without compensation by the Taking Clause of the United States Constitution. Because the Texas Supreme Court has taken a position on a federal question contrary to that of this Honorable Court, its judgment in this case should be reversed. The Texas Supreme Court has erroneously interpreted the nature and extent of federal power under the Commerce Clause and

its judgment will effect a taking of Petitioner's property, without just compensation, if allowed to stand.

The questions presented in this case involve important questions of federal law concerning the rights of private property owners versus federal power under the Commerce Clause to control the use of navigable waters. If allowed to stand, the Texas Supreme Court decision will have the effect of greatly deterring private owners of property from developing and improving their property with navigable waterways. No longer will a prudent investor or private developer in Texas be apt to invest large sums of money to improve property with navigable waterways absent the right to control the use of these waterways. This is what this Court in *Kaiser Aetna, supra,* must have realized when it denied the existence of an automatic public right-of-way in privately developed navigable waterways. This Court in *Kaiser Aetna, supra,* expressly recognized what the Texas Supreme Court failed to recognize—that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 444 U.S. 164, 176 (1979). To say, as the Texas Supreme Court has said, that the owner of a privately developed navigable waterway lacks the power to control the use of that waterway because of state and federal sovereignty therein, fails to recognize the importance of that right to the private property owner and misstates federal law on this question. Without the right to regulate the use of his property, of what value is the property to its owner? To say that federal law precludes this right in private owners of navigable waterways because of the superior authority of Congress to control and regulate this nation's navigable waters misses the point. Petitioner would respectfully suggest that the Texas

Supreme Court has confused the issue of Commerce Clause power with the issue of taking by regulation. The Texas Supreme Court has apparently failed to recognize the restriction on government regulatory power imposed by the Taking Clause of the United States Constitution, including that regulatory power conferred by the Commerce Clause. This Honorable Court expressly recognized and enforced this restriction in both *Kaiser Aetna, supra,* and *Vaughn, supra,* and should now grant a writ of certiorari to the Supreme Court of Texas to reaffirm this restriction.

I. THE DECISION OF THE TEXAS SUPREME COURT THAT A GRANT OF AN EASEMENT OF USE AND CONTROL TO A PRIVATELY DEVELOPED MARINA IS PRECLUDED BY THE COMMERCE CLAUSE AND STATE AND UNITED STATES GOVERNMENT SOVEREIGNTY OVER NAVIGABLE WATERS IS IN CONFLICT WITH RECENT DECISIONS OF THIS COURT ON THIS ISSUE.

In its opinion of January 5, 1983, the Texas Supreme Court held that a grant of an easement purporting to limit the use of navigable waters conflicts with the state and United States governments' sovereignty over such waters (26 Tex. Sup. Ct. J. 173; App. A, 4a). This holding is in conflict with recent decisions by this Court concerning the rights of private property owners versus federal power under the Commerce Clause to control the use of navigable waters. See: *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Vaughn v. Vermilion Corporation,* 444 U.S. 206 (1979); and *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062 (1946).

These cases clearly establish the federal rules (which apply to and control the disposition of this case) that the exclusive right of use of privately held land may be preempted by the federal government, but until such an affirmative act of preemption takes place, the right of use of private property remains in the owner, regardless of whether such property lies under navigable waters. Further, these cases clearly and unequivocally establish that this right of preemption by the government, otherwise plenary in character, is conditioned upon and subject to compliance with the Taking Clause of the United States Constitution. Therefore, the Texas Supreme Court has taken a position contrary to that of this Court in its construction of federal law as precluding easements to non-public land under navigable water. The opinion of the Texas Supreme Court incorrectly states the nature and extent of federal power under the Commerce Clause.

A. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the owners of a small pond in Hawaii connected it to a bay to create a marina. The owners established a fee for the use of the marina and attempted to exclude the public from entering the pond area, claiming they owned the right to exclude non-paying members from entering the area, regardless of the navigability of the waters in question. The United States sought a declaratory judgment that the owners had no such right because "the public enjoys a federally protected right of navigation over the navigable waters of the United States." 444 U.S. at 164, 170. This Court disagreed and, in holding in favor of the owners, stated: "[W]hile Kuapa Pond may be subject to regulation by the Corps of Engineers . . . it does not follow that the pond is also subject to a public right of access." 444 U.S. 164, 172-173. This Court ex-

pressly found that to so hold would create "a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172.

This Court in *Kaiser Aetna, supra*, had "not the slightest doubt" that the Government could have refused to allow the dredging. *Id.* at 179. This Court also found that there was "no question" but that Congress could assure the public a free right of access to the marina *if it so chose*. *Id.* at 174. But this Court also clearly and unequivocally found: (1) The owner of private property does not lose the right to exclude others merely upon connecting it to navigable water *Id.* at 180; (2) Until the Government elects to use its preemptive power to take away that right for some public purpose, the right to exclude remains in the owner *Id.* at 180; (3) The power to take away the privately held right of exclusion, albeit absolute, can only be exercised in compliance with the "Taking Clause" of the United States Constitution *Id.* at 180; and (4) Even if the Government takes only an *easement* in property, it must nonetheless pay just compensation as a condition to the taking of the easement *Id.* at 180, [citing *United States v. Causby*, 328 U.S. 256 (1946)].

The Texas Supreme Court has taken a position that is inconsistent with that of this Court in *Kaiser Aetna, supra*. This Court in *Kaiser Aetna, supra*, found that the right of use and control of the water above privately owned land belongs to the holder of that right, the private landowner, unless and until the government exercises its power to take away that property right and pays the private owner just compensation.

In *Kaiser Aetna, supra*, the owners of the pond connected it to a bay. In the present case, the owner of the land (Bellaire Corporation) dredged out a turning basin and canals and connected it to Galveston Bay. In *Kaiser Aetna, supra*, the government claimed a loss of the right of control over the navigable water above the owner's land. In the present case, the Texas Supreme Court found that Terramar's predecessor in interest (Bellaire) lost its right of control over the navigable water above its land. In *Kaiser Aetna, supra*, this Court held that there was no such automatic loss of control under the Commerce Clause. The Texas Supreme Court is bound to follow the decisions of this Court on questions of federal law and should have affirmed the lower courts' judgments that Terramar's predecessor in interest had the right to control the use of the turning basin, including the power to assign this right of control to Terramar, and affirmed the lower courts' judgments granting Terramar an injunction for the enforcement of its easement rights.

The Texas Supreme Court's holding that Terramar's predecessor in interest had no right to control the use of the bottomland or the surface waters of the turning basin, nor the power to assign this right of control to Terramar on the ground that such a right would be an invalid limitation on government sovereignty over such waters, is inconsistent with this Court's holding in *Kaiser Aetna, supra*. In *Kaiser Aetna, supra*, the United States Supreme Court expressly found to the contrary in holding that federal power over navigable waters above private property did not mean that the private property owner lost the right of control over the use of his property, including the navigable waters above, simply upon the submergence under or connection of his land with navigable waters.

While this Court affirmed the power of the government under the Commerce Clause to preempt and supersede the right of the private property owner, it expressly required that any such exercise of this power be in compliance with the Taking Clause of the United States Constitution. In short, the private property owner keeps all the "sticks" in his bundle of property rights, unless and until the government decides to take away some or all of these "sticks" for some public good. None of these "sticks" of ownership were lost upon the enactment of the Commerce Clause, and there is no inherent preeminent right of control over navigable waters above non-public land in the government.

B. *Vaughn v. Vermilion Corporation*, 100 S.Ct. 399 (1979), was a companion case to *Kaiser Aetna v. United States, supra*. The facts of the cause before this Honorable Court, and the facts of *Vaughn, supra,* are indistinguishable.

In *Vaughn,* the respondent, Vermilion Corporation, was the lessee of private property upon which man-made navigable canals had been constructed and maintained with private funds. The lessee, Vermilion Corporation, shared a joint right with its lessor, Exxon Company, to use the canals which lay between the Intracoastal Canal and the Gulf of Mexico. Vermilion subleased portions of the Exxon land, for a price, to hunters and fishers and sought an injunction to exclude the petitioners, non-paying fishers and hunters, from use of the canals. The petitioners claimed that notwithstanding Vermilion's property rights, they were entitled as a matter of federal law—without obtaining respondent's permission—to travel the canal and engage in commercial fishing and shrimping activities. *Id.* at 401.

This Court again ruled that the owners of the canals, developed with private funds, retained the exclusive right of control of access to those canals, regardless of their being "navigable waters." This Court did not say that this right to keep others out was absolute. Of course, as noted in *Kaiser Aetna, supra,* the federal government could have ordered the canal owners to open the canals up to public navigation. However, the Court expressly found that "no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause of Art. I of the United States Constitution." 100 S.Ct. 399, 401.

The facts in the present case are indistinguishable from those in *Vaughn, supra.* In *Vaughn, supra,* the plaintiff's predecessor in interest owned dry land, constructed navigable canals with his own money, and then attempted to keep others from using the canals without his permission. In the present case, Terramar's predecessor in interest owned dry land, constructed navigable canals and a turning basin with his own money, then assigned his right of control over the use of the waters above the turning basin to Terramar, who, in turn, has sought to enforce this right through permanent injunction to keep Carrithers and Coulter from using the property contrary to the wishes of Terramar as easement holder.

The Texas Supreme Court has held that Terramar's predecessor in interest had no such power to grant an easement to Terramar because of the superior authority over navigation conferred upon Congress and the State. This Court, on the same facts as present in this case, found in *Vaughn, supra,* that "no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause of

Art. I of the U. S. Constitution." *Id.* at 209. This Court went on to hold that unless on remand it was found that the man-made canals were created by the destruction of natural waterways (a fact issue not present in this case), then plaintiff was entitled to injunctive relief on the ground that "channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways" do not become subject to general use by the public. *Id.* at 206.

C. The Texas Supreme Court has determined that Terramar's canals became subject to public use and control immediately upon their being impressed with the character of "navigable waters." Quoting from the court's slip opinion:

> "In Texas, the state owns the water, the beds and shores of the Gulf of Mexico. . . . The waters of public navigable streams are held by the state in trust for the public, primarily for navigation purposes. . . . The exclusive right to control, impede, or otherwise limit navigable waters in this state belongs to the governments of Texas and the United States. . . . Thus, as grantor, the Bellaire Corporation could not give White (or Terramar as his assignee) the exclusive use of navigable waters which are owned by the State of Texas. We hold that a grant of the easement purporting to limit the use of navigable waters conflicts with the state and United States governments' sovereignty over such waters." (26 Tex. Sup. Ct. J. 173, citations omitted.)

The position that the Texas Supreme Court has taken in the present case is contrary to that of this Court in both *Kaiser Aetna, supra,* and *Vaughn, supra.* The canals and turning basin were established in exactly the same way as the bodies of "navigable water" in these two United

States Supreme Court cases. In *Vaughn, supra*, this Court held that the owners of private property who improve that property with navigable canals do not lose any rights of use or control over those canals. The Texas Supreme Court has determined that such owners do lose their rights of use and control because of state and federal sovereignty considerations in the navigable water area. In *Kaiser Aetna, supra*, this Court held that the government could not force the owners of property improved with a navigable waterway and marina to open up access to those waters, absent a condemnation proceeding and payment of just compensation. This approach is exactly what this Court recognized was required in *Kaiser Aetna, supra*, and *Vaughn, supra*, when it upheld the private property owners' rights over those claimed by the government based on navigable water authority. Therefore, Terramar's easement, a property right protected by the Taking Clause under *United States v. Causby, supra*, should be found valid by this Honorable Court, and Terramar's right to injunctive relief affirmed.

II. THE DECISION OF THE TEXAS SUPREME COURT THAT THE STATE TAKES FREE OF EASEMENTS GRANTED TO OTHERS WHEN PROPERTY UNDER NAVIGABLE WATERS IS *QUITCLAIMED* TO THE STATE VIOLATES PETITIONER'S RIGHTS UNDER THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

The Texas Supreme Court has determined that the right of a private landowner to control and delimit the use of his privately owned land below navigable waters is precluded by state and federal sovereignty over those waters. This interpretation leads to the inescapable result that hereinafter, once any private property in Texas becomes

submerged by navigable waters, the owner of that property forfeits the right to dictate the use of this property. Under this holding, Texas landowners effectively if not actually lose title to their property to the government upon the property's submergence by or development into navigable water. The Commerce Clause does not require this and to so hold in the present case is in and of itself a taking of Terramar's property in violation of the Taking Clause.

The State of Texas took title from Terramar's predecessor in interest with full knowledge of Terramar's easement rights granted to him by his predecessor in interest. Neither TEX. NAT. RES. CODE ANN. § 11.012(b) (Vernon 1978) or (c) should be interpreted as giving the state of Texas ownership rights beyond those obtained in compliance with the Taking Clause of the United States Constitution. Under the traditional rules of statutory construction, where the language of a statute is broad enough to cover matters without, as well as within, constitutional boundaries, the courts should construe the statute in a restricted sense, as applying only to matters lying within the constitutional framework. *Waco v. Landingham*, 138 Tex. 165, 157 S.W.2d 631 (1941).

Under Texas property law, an easement has long been recognized as property and an interest in land which is protected by the Constitution. *Miller v. Letzerich,* 121 Tex. 248, 49 S.W.2d 404 (1932). This Court, almost 40 years ago, held that easements are such rights in property that are protected under the Taking Clause. *United States v. Causby,* 328 U.S. 256 (1946). This Court has held repeatedly that a Fifth Amendment taking can occur through the destruction of the use and enjoyment of a legitimate private property right through an

exercise of state police power. Also, this Court has just recently said that the states do not have unlimited power to redefine property rights without running afoul of the Taking Clause. *Loreto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). It has also been said that a state may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed. *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981).

The Texas Supreme Court has held that Terramar's easement was invalid because of the paramount authority of the state and federal governments to regulate the use of navigable waters, including the bottomland of navigable waters. The easement in question was granted by the Bellaire Corporation at a time when Bellaire owned the turning basin in fee simple. The Texas Supreme Court has held that Bellaire had no right to grant the easement because "an easement may not create a right or interest in a grantee's favor which the grantor himself did not possess." (26 Tex. Sup. Ct. J. 173; See App. 3a.) If it is to be said now that Bellaire did not have the right to control the use of the turning basin, it is only because the Texas Supreme Court has since determined that such right was lost upon the turning basin becoming a navigable body of water. This is nothing short of a retroactive taking of Bellaire's most valuable right—the right to use its property the way it saw fit. Such a redefinition of property rights is contrary to this Court's holdings in *Loreto v. Teleprompter Manhattan CATV Corp., supra,* as well as *Kaiser Aetna v. United States, supra,* and *Vaughn v. Vermilion Corporation, supra.* The turning basin was private, not public, property at the time it was

conveyed by quitclaim deed to the State. As private property, the State was obligated to pay for the acquisition of all the rights it wanted in the property. The quitclaim deed gave to the State only those rights the grantor Bellaire had. The State knew or should have known of the possibility that there were outstanding rights in the turning basin which were not affected by the quitclaim deed from Bellaire. The State of Texas should not now be able, under the guise of a broad veil of regulatory authority, to claim the entire interest in the turning basin. The outstanding interests in the turning basin were subject to compensation, the same as those obtained through the quitclaim from Bellaire. Absent a condemnation of the easement and payment therefor, the State of Texas should not be able to take Terramar's easement as its own. This is exactly what the Texas Supreme Court has expressly admitted to doing when it concluded: "Having found the easement invalid, the title the State took by the 1978 quitclaim deed to the turning basin bed is unencumbered by the purported easement. Consequently, construction of the marina is subject only to the State's consent *as owner of the bed,* and authorization from the United States government. . . ." (26 Tex. Sup. Ct. J. 172; See App. A 5a) (Emphasis added.)

It is important for this Honorable Court to understand the circumstances under which the easement was granted by Bellaire. First, Bellaire received good consideration for the easement. Second, Terramar acquired the easement to regulate the use of the turning basin to protect the members of the association from private uses of the turning basin deemed undesirable, particularly the construction contemplated by the Respondents. Third, the Respondents took title to their property adjoining the

turning basin subject, in express terms, to Terramar's easement rights. The value of the easement to Terramar and its membership was to keep the turning basin in its undeveloped state, in order to maintain the environmental quality and aesthetics of this turning basin, and to maintain its peaceful and quiet enjoyment. Bellaire received consideration for the easement and from the State for the remaining rights in the turning basin. The State, through its Supreme Court, should not now be able to take the "whole pie" when it only paid for a part. The fact that the State justifies this taking under the Commerce Clause or state statute[15] does not validate it or make it any less a violation of the Taking Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment of the Supreme Court of Texas.

Respectfully submitted,

ROBERT M. MOORE & ASSOCIATES

By: _____

ROBERT M. MOORE
(Counsel of Record)
7511 Broadway
Galveston, Texas 77551
(409) 740-0224

Attorneys for Petitioner

15. See TEX. NAT. RES. CODE § 11.012(b) and (c) (reprinted herein under "State Statutes Involved").

APPENDIX A

THE TEXAS SUPREME COURT JOURNAL

C. ED. CARRITHERS AND ROBERT G. COULTER

v.

TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSN., INC.

No. C-1066

From Galveston County, First District.

Writ of error granted April 21, 1982. (25 Tex. Sup. Ct. Jour. 272) (Opinion of CA, 630 S.W.2d 648.)

Judgments of the courts below are reversed and the permanent injunction by the trial court is dissolved and the cause of action is dismissed. (Opinion by Justice Ray. Justices Robertson and Kilgarlin not sitting.)

For Petitioners: Fred A. Lange, Houston, Texas.

For Respondents: Robert M. Moore, Galveston, Texas.

Terramar sought and obtained a permanent injunction prohibiting the defendants, Ed Carrithers and Robert Coulter, from constructing a marina partially on their land, but mostly in a submerged "turning basin" in which the plaintiff, Terramar Beach Subdivision, Inc., claims an easement. The trial court determined Terramar owned a perpetual, irrevocable and exclusive easement over all the submerged land in the turning basin and found the proposed marina would infringe on its easement rights. Carrithers and Coulter were permanently enjoined from

constructing the marina. The court of appeals affirmed. 630 S.W.2d 648. At issue is the validity of the easement. Finding the easement to be invalid, we reverse the judgments of the courts below, dissolve the injunction and dismiss the cause of action.

The area in dispute is an 8.27172-acre turning basin on Galveston Island, which was submerged in 1963 by artificial means. The parties have stipulated that the turning basin is a navigable body of water, open to the Gulf of Mexico. At the time of submergence, the HGC Development Corporation owned legal title to all of the land which both plaintiffs and defendants now own. The turning basin and the canals leaving the basin were created by HGC from the tract of land. HGC then conveyed all of its rights to Timewealth Corporation, its trustee in bankruptcy. Subsequently, Timewealth Corporation conveyed the turning basin and canals to the 7500 Bellaire Corporation. In 1975, the Bellaire Corporation granted Cary White an easement of the full, free and uninterrupted use of all the turning basin and the waters overlying the basin. In turn, White assigned the easement to Terramar. Carrithers and Coulter acquired their property rights from the Bellaire Corporation subject to Terramar's easement. In 1978, the bed of the turning basin was conveyed by the Bellaire Corporation to the State of Texas by quitclaim deed. Carrithers and Coulter obtained a permit in 1980 from the United States Army Corps of Engineers to construct a marina located mainly in the turning basin. Terramar sought this injunction prohibiting construction on the basis of its exclusive easement to the land and the overlying navigable waters. The trial court's injunctive order permanently prohibits Carrithers and Coulter from essentially placing any objects in or on the land area,

and on or over the surface water of the "turning basin" where Terramar's easement exists, or otherwise obstructing, impairing, or interfering with Terramar's exclusive easement. The order expressly provides, however, that it should not be construed to limit or enjoin any person from using the waters of the turning basin for swimming, boating, fishing, or water transportation.

In Texas, the state owns the water, the beds and shores of the Gulf of Mexico. TEX. NAT. RES. CODE ANN. art. 11.012(c). The waters of public navigable streams are held by the State in trust for the public, primarily for navigation purposes. *Motl v. Boyd*, 116 Tex. 82, 111, 286 S.W. 458 (1926). Texas has full sovereignty over the waters of the Gulf within its boundaries, subject to the United States government's right to exercise complete dominion over navigable waters under the "commerce clause" of the Constitution. U.S. CONST. art. I, § 8, cl. 3; TEX. NAT. RES. CODE ANN. art. 11.02(c).

An easement may not be created by express grant, or otherwise, if it is in contravention of a statute or is against public policy. *See Woolsey v. Panhandle Refining Co.*, 131 Tex. 449, 116 S.W.2d 675 (1938); *Neff v. Ulmer*, 404 S.W.2d 644, 646 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.); *Wilson v. Meredith, Clegg & Hunt*, 268 S.W.2d 511, 518 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.). Further, an easement may not create a right or interest in a grantee's favor which the grantor himself did not possess. *See Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 202 (Tex. 1962). The exclusive right to control, impede or otherwise limit navigable waters in this State belongs to the governments of Texas and the United States. An individual landowner

is without power to convey such a right. Thus, as grantor, the Bellaire Corporation could not give White (or Terramar as his assignee) the exclusive use of navigable waters which are owned by the State of Texas. We hold that a grant of the easement purporting to limit the use of navigable waters conflicts with the state and United States governments' sovereignty over such waters. U.S. CONST. art. I, § 8; TEX. NAT. RES. CODE ANN. art. 11.012(b).

The Bellaire Corporation purported to convey a perpetual exclusive easement and right of way not only for the full, free and uninterrupted use of the tract of land, but also for the waters overlying the land. Terramar contends the easement across the underlying beds would still be valid and enforceable even though the public might own the waters above the bed, relying on *Port Acres Sportsman Club v. Mann*, 541 S.W.2d 847 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.). In *Mann*, a fee simple owner of the bed of a navigable stream was enjoined and prevented from maintaining a fence across the navigable stream and from preventing the defendants and other members of the general public the right of free passage. The court in *Mann* held that since the waters over the plaintiff's land were not navigable at the time the land was acquired, the subsequent event of the waters becoming navigable could not deprive plaintiffs of their title to the underlying land. Although the fee owner owned the bed, he could not control the use of the bed by maintaining a fence to prevent the public use of the overlying waters. *Mann, supra* at 849. The facts of the instant case are distinguishable in that Terramar does not own a fee simple interest in the bed, but instead it claims an easement therein.

Having found the easement invalid, the title the State took by the 1978 quitclaim deed to the turning basin bed is unencumbered by the purported easement. Consequently, construction of the marina is subject only to the State's consent as owner of the bed, and authorization from the United States government under 33 U.S.C. §§ 401, 403 (1976).

Accordingly, the judgments of the courts below are reversed and the permanent injunction issued by the trial court is hereby dissolved.

C. L. RAY
Justice

Justices Robertson and Kilgarlin not sitting.

Opinion delivered January 5, 1983.

APPENDIX B

C. Ed. CARRITHERS and Robert G. Coulter,
Appellants,

v.

TERRAMAR BEACH COMMUNITY
IMPROVEMENT ASSOCIATION, INC.,
Appellee.

No. 18026

COURT OF APPEALS OF TEXAS
Houston (1st Dist.).

Nov. 19, 1981.

Rehearing Denied Jan. 7, 1982.

Before EVANS, C. J., and DOYLE and STILLEY, JJ.

EVANS, Chief Justice.

The defendants appeal from a permanent injunction prohibiting them from constructing a marina on their land and in a submerged "turning basin" of the Terramar Beach Subdivision in Galveston County.

The trial court determined that the plaintiff owned a perpetual, irrevocable and exclusive easement over all the submerged land in the turning basin and found that the proposed marina would infringe on the plaintiff's easement rights.

The principal contention of the defendants is that they hold a valid permit which was granted by the United States Army Corps of Engineers to construct the pro-

posed marina, and that this permit supercedes any easement rights previously held by the plaintiff. In support of this contention, the defendants argue that state and federal regulatory agencies have exclusive authority to control all navigable waters, and that the plaintiff's easement rights must therefore be considered subservient to their rights under the federally issued permit.

The parties stipulated that the area in dispute was a navigable body of water, submerged by artificial means in 1963 from dry land owned by the plaintiff's predecessor in title. The easement held by the plaintiff was created by written instrument in May 1975, and the defendants acquired their property rights subject to the plaintiff's easement. The trial court found the following facts, which are unchallenged.

> 1. Plaintiff is the owner of a perpetual, irrevocable and exclusive easement and right of way which includes the full, free and uninterrupted use of all of the turning basin of Terramar Beach Subdivision in Galveston County and the waters overlying said turning basin.
>
> 2. Defendants, owners of certain lands close to the turning basin, were granted a permit from the United States Army Corps of Engineers to construct a marina, bulkhead, docks, boat ramps, timber pilings, walkways and boat sheds, part of which would be located on their land, but most of which would be located in the turning basin where the plaintiff has its easement.
>
> 3. Defendants' proposed project would intrude into the plaintiff's exclusive easement to the land

beneath the waters of the turning basin and would deprive plaintiff and its members of the rights held by them under such easement.

4. Although the surface waters of the turning basin are open for public use, the underlying land has never been dedicated to or appropriated for public use and the plaintiff has never abandoned its easement.

The trial court's injunctive order permanently prohibits the defendants from:

(1) Digging or removing earth, sand, marl or in any way displacing same, blocking, filling in, driving pilings of any size or length into, anchoring into or on, dumping, dredging, or placing any permanent or stationary objects or appurtenances in or on the land area where the Plaintiff's exclusive easement exists;

(2) Placing any objects on or over the surface waters of the "turning bain" where Plaintiff's easement exists which are in any way designed or meant to facilitate the temporary or permanent storage of boats, barges, boat ramps, docks or any facility which in any way blocks or impedes the full and complete usage of the surface waters of the "turning basin" where Plaintiff's easement exists;

(3) Obstructing or in any other manner impairing or interfering with the Plaintiff's exclusive easement.

The order further provides that it shall not be construed to limit or enjoin any person from using the waters

of the turning basin for swimming, boating, fishing or water transportation.

[1] It is undisputed that the parties hold under a common grantor and that the property rights of the defendants were acquired subject to the easement held by the plaintiff in the turning basin area. The instrument conveying the easement to the palintiff's predecessor in title contains covenants of general warranty, and the defendants, claiming title under such common source of ownership, are therefore estopped to question the validity of the estate which the deed purports to convey. *Burns v. Goodrich*, 392 S.W.2d 689, 691 (Tex. 1965). Thus, because of the relationship between the plaintiff and the defendants, it is immaterial that the waters overlying the bed of the turning basin are navigable. *Lorino v. Crawford Packing Co.*, 142 Tex. 51, 175 S.W.2d 410, 416 (1943).

[2] The grant of a permit by the U. S. Army Corps of Engineers to the defendants did not bestow upon them any property rights with respect to the submerged lands in the turning basin. In fact, both the permit and the Corps' rules and regulations upon which the permit was issued, expressly provide to the contrary:

> "Authorization of work or structures by the Department of the Army does not convey a property right nor authorize any injury of property or invasion of other rights." 33 C.F.R., § 320.4(g) (1980).

The permit itself provides:

> That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and, that it does not authorize any injury to property or invasion of rights or any infringement

> of Federal, State or local laws and regulations, nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

The grant of a permit by the U. S. Army Corps of Engineers merely reflects the determination by that agency that it has reviewed and approved the proposed activity as being in the "public interest" with respect to navigation, fish and wildlife, conservation, pollution and other environmental considerations. 33 C.F.R. § 209.120 (1968); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

[3] No dispute exists between the plaintiff and the public at large concerning the use of the turning basin, and the injunction order expressly recognizes the rights of the general public to make appropriate use of the waters overlying the bed of the turning basin. Thus, there is no conflict between the rights of the plaintiff, which the injunction order seeks to protect, and the rights of the public, which are protected by State and Federal laws. The relationship between the plaintiff and the defendant makes it unnecessary to decide the question of ownership of the bed of the turning basin as between the plaintiff and the State of Texas, and this court has made no determination with respect to that issue.

[4] The defendants further contend that the submergence of the turning basin effected an abandonment of the easement, arguing that the public character of the waters made it impossible for the owner of the easement to control the installation of piers, pilings and docks in the turning basin without interference with the public's right of use. This contention will be overruled. It is undisputed that the purpose of the easement was to control

marine traffic within the turning basin by restricting the structures that could be erected therein. The plaintiff's easement rights were created after the bed of the turning basin was submerged beneath navigable waters, and the public character of the waters overlying the turning basin does not prevent the plaintiff from exercising the rights granted it under the easement.

The permanent injunction order is affirmed.

APPENDIX C

NO. 118,560

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
56TH JUDICIAL DISTRICT

TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSOCIATION, INC.

v.

C. ED. CARRITHERS and
ROBERT C. COULTER

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

After the trial of the above styled cause, subsequent to the entry of judgment, and upon timely request of the defendants, I, ALLAN LERNER, the presiding Judge of the trial in the above cause, rendered the following FINDINGS OF FACT AND CONCLUSIONS OF LAW which are hereby ORDERED, ADJUDGED and DECREED to be a part of the proceedings in this cause, to be filed by the District Clerk as a part of the record:

FINDINGS OF FACT

I.

TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSOCIATION, INC. is the owner of a perpetual, irrevocable and exclusive easement and right-of-way which include the full, free and uninterrupted use of all of the Turning Basin of Terramar Beach Subdivision

situated in Galveston County, Texas and the waters overlying said Turning Basin, said area being more particularly described in that instrument which is recorded in Volume 2899, Pages 674-678 of the Deed Records of Galveston County, Texas, to-wit:

> 8.27172 acre tract, more or less, out of Division Fourteen (14), Section Thirteen (13), Hall and Jones Survey, Abstract 121, Galveston County, Texas, being the same tract described in Exhibit "A" attached to that certain instrument for easement executed by 7500 Bellaire Corp. to Cary C. White, Trustee, dated May 1, 1975, recorded in Volume 2569 at Pages 466-469, in the Deed Records of Galveston County, Texas.

II.

The Defendants, through ROBERT G. COULTER, Trustee, own certain real property described of record in the Deed Records of Galveston County, Texas, Volume 3011, Pages 655-659, and Volume 3036, Pages 421-425 in Section 13, Hall and Jones Survey, Galveston Island, Galveston County, Texas and the lands described in these Deeds are close to the Turning Basin described in Finding Number I.

III.

The Turning Basin was created mechanically on or about 1963 from a dry land area owned by the Plaintiff's predecessor in title and is now an extension of that body of water known as "West Bay" and is considered to be a navigable body of water.

IV.

The Plaintiff's easement was originally given and created subsequent to the creation of the water area de-

scribed above by the successors in interest to the fee simple title of the land where the Turning Basin was created.

V.

The Defendants were granted a permit from the United States Army Corps of Engineers pursuant to Section 10 of the River and Harbor Act of 1899, which would allow them to construct a marina, bulkhead, docks, boat ramps, timber pilings, walkways and boat sheds, part of which would be located on the Defendants' land, but most of which would be located in the Turning Basin and the area where the Plaintiff has its easement.

VI.

Such a project or development by the Defendants would be an intrusion into the Plaintiff's exclusive easement to the land beneath the waters of the Turning Basin.

VII.

The project would deprive the Plaintiff and its members those rights held by them and the same would constitute an infringement of the rights to the exclusive, full and uninterrupted use of the easement.

VIII.

Although the surface waters of the Turning Basin are open for public use and are navigable waters, the underlying land has not been dedicated to nor appropriated for public use.

IX.

On August 14, 1978 the 7500 Bellaire Corporation conveyed a Quit Claim Deed of the land underlying the

Turning Basin to the State of Texas. Such Deed is recorded in Volume 3021, Pages 250-252, of the Deed Records of Galveston County, Texas. Such Deed to the State of Texas was subsequent to and subject to the Plaintiff's exclusive easement rights.

X.

The Defendants acquired their property rights and permits subsequent to Plaintiff's acquisition of their easement and with knowledge of Plaintiff's claim of easement rights.

XI.

The Plaintiff has never abandoned its easement.

XII.

The Turning Basin is very small and, based upon the amount of boat traffic which comes into the area, the Basin would be much too small to accommodate any substantial outside boat traffic.

XIII.

If the Turning Basin is built in accordance with the Defendants' plans and specifications, there would be a substantial increase in the amount of boat traffic in the area; and, boat storage in the Turning Basin area will cause weakening of the channel bulkheads, pollution and damage to the aesthetics of the Turning Basin, acceleration of the fill-in where the channel enters Galveston Bay, will increase the necessity of maintenance dredging and generally degrade the quality of life for the subdivision as a whole by attracting a large number of people in such

a small area, causing greater road congestion, noise and disturbance of the peaceful and tranquil atmosphere which exists in the subdivision.

CONCLUSIONS OF LAW

I.

Even though the Defendants have obtained a permit for the construction of the improvements referred to in the FINDINGS OF FACT, the permit is not controlling since, although the permit may have been required by the Corps of Engineers, consent by the Plaintiff would have also been required since the underlying lands were not public lands, or if they had become public lands, the public's rights are subject to the Plaintiff's easement to the land beneath the water of the Turning Basin.

II.

The Plaintiff has no adequate remedy of law or otherwise for the harm threatened to be done by the Defendants and it and its members will suffer irreparable harm, damages and injuries by virtue of such intrusion in and on such a small area as the Turning Basin, unless the proposed project and development are enjoined.

ENTERED this _____ day of _____, 1981.

JUDGE ALLAN LERNER,
Acting Judge,
District Court of Galveston
County, Texas—56th Judicial
District

APPENDIX D

NO. C-1066

From Galveston County, First District

C. ED CARRITHERS AND
ROBERT G. COULTER
Petitioners

v.

TERRAMAR BEACH COMMUNITY IMPROVEMENT ASSOCIATION, INC.
Respondent

This cause was heard on writ of error to the Court of Appeals for the First Supreme Judicial District. After consideration of the original transcript and the transcript showing the proceedings in the Court of Appeals, it is the opinion of the Court, (Justices Robertson and Kilgarlin not sitting.), that there was error in the judgments of the courts below and judgment is rendered as follows:

It is ordered that: 1) the judgments of the Court of Appeals and the trial court which permanently enjoined Carrithers and Coulter from constructing a marina are reversed.

2) The injunction is dissolved and the cause of action is dismissed in accordance with the opinion of this Court.

3) Terramar Beach Community Improvement Association, Inc. shall pay the costs in this Court, the Court of Appeals and the District Court.

4) C. Ed Carrithers and Robert G. Coulter shall recover the costs they incurred in said courts from Terramar Beach Community Improvement Association, Inc.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Galveston County, Texas for observance.

(Opinion of the Court by Justice Ray)

APPENDIX E

POINTS OF ERROR TO COURT OF CIVIL APPEALS

FIRST POINT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEE'S PETITION FOR A PERMANENT INJUNCTION BECAUSE SUCH ARBITRARY ACTION BY THE TRIAL COURT WAS CLEARLY CONTRARY TO THE COMMERCE CLAUSE OF THE U. S. CONSTITUTION AND THE LAWS OF THE STATE OF TEXAS WHICH PLACE THE SOLE CONTROL OVER NAVIGABLE STREAMS OR WATERS IN REGULATORY AGENCIES OTHER THAN PRIVATE PARTIES CLAIMING UNDER AN EXCLUSIVE EASEMENT AS THE APPELLEE IN THIS CASE.

SECOND POINT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEE'S PETITION FOR A PERMANENT INJUNCTION BECAUSE APPELLEE THROUGH ITS OWNERSHIP OF AN EASEMENT DID NOT HAVE THE RIGHT AND POWER TO PRE-EMP AND VETO A PERMIT GRANTED UNDER THE COMMERCE CLAUSE THROUGH THE U. S. CORPS OF ENGINEERS TO THE APPELLANTS UNDER THE AUTHORITY OF SUCH PERMIT.

THIRD POINT OF ERROR

THE TRIAL COURT ERRED IN ITS FINDING OF FACT NO. 1 THAT THE APPELLEE WAS THE

OWNER OF A PERPETUAL, IRREVOCABLE AND EXCLUSIVE EASEMENT AND RIGHT-OF-WAY WHICH INCLUDED THE FULL, FREE AND UNINTERRUPTED USE OF ALL OF THE TURNING BASIN AND THE WATERS OVERLYING SAID TURNING BASIN, COVERING 8.27172 ACRES, IN THAT THE RECORD SHOWS THAT THE WATERS COVERING SAID TURNING BASIN WERE NAVIGABLE WATERS, AND HAD BEEN SINCE 1963 WHICH WAS PRIOR TO THE CREATION OF THE EASEMENT CLAIMED BY APPELLEE, ALL OF WHICH PRECLUDED THE APPELLEE FROM EXERCISING CONTROL OVER SUCH NAVIGABLE WATERS AND THE ERECTION OF ANY STRUCTURES WITHIN SUCH WATERS, SINCE SUCH CONTROL WAS VESTED IN THE U. S. CORPS OF ENGINEERS BY THE COMMERCE CLAUSE OF THE U. S. CONSTITUTION.

FOURTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS FINDING OF FACT NO. VI AND VII THAT THE PROJECT OR DEVELOPMENT FOR WHICH THE APPELLANTS HAD BEEN GRANTED A PERMIT BY THE U. S. ARMY CORPS OF ENGINEERS PURSUANT TO SECTION 10 OF THE RIVER AND HARBOR ACT OF 1899, WHICH WOULD ALLOW THEM TO CONSTRUCT A MARINA, BULKHEAD, DOCKS, BOAT RAMPS, TIMBER PILINGS, WALKAWAYS AND BOAT SHEDS, PART OF WHICH WOULD BE LOCATED ON APPELLANTS LAND, BUT MOST OF WHICH WOULD BE LOCATED IN THE TURNING BASIN AND THE AREA WHERE APPELLEE HAS

ITS EASEMENT, WOULD BE AN INTRUSION INTO APPELLEES EXCLUSIVE EASEMENT TO THE LAND BENEATH THE WATERS OF THE TURNING BASIN, AND AN INFRINGEMENT TO THE RIGHTS TO THE EXCLUSIVE, FULL AND UNINTERRUPTED USE OF THE EASEMENT, SINCE SUCH FINDINGS ARE NOT SUPPORTED BY THE RECORD IN THAT THE ERECTION OF THE MARINA AND THE OTHER STRUCTURES COMPLAINED OF ARE ALLOWED BY VIRTUE OF THE CONTROL IN THE U. S. CORPS OF ENGINEERS OVER NAVIGABLE STREAMS TO GRANT PERMITS FOR SUCH PROJECTS IRRESPECTIVE OF ANY RIGHTS HELD BY PRIVATE EASEMENT HOLDERS WHICH ARE SUBSERVIENT TO SUCH PERMITS BY ACT OF CONGRESS, AND SUCH A PERMIT HAD BEEN GRANTED TO APPELLANTS.

FIFTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS CONCLUSION OF LAW NO. I THAT EVEN THOUGH THE APPELLANTS HAVE OBTAINED A PERMIT FOR THE CONSTRUCTION OF THE IMPROVEMENTS REFERRED TO IN THE FINDINGS OF FACT, THE PERMIT IS NOT CONTROLLING SINCE, ALTHOUGH THE PERMIT MAY HAVE BEEN REQUIRED BY THE CORPS OF ENGINEERS, CONSENT BY THE APPELLEE WOULD HAVE ALSO BEEN REQUIRED SINCE THE UNDERLYING LANDS WERE NOT PUBLIC LANDS, OR IF THEY HAD BECOME PUBLIC LANDS, THE PUBLIC'S RIGHTS ARE SUBJECT TO APPELLEES EASEMENT TO THE LAND BENEATH THE WATER OF

THE TURNING BASIN, BECAUSE SUCH CONSENT OF THE APPELLEE WOULD NOT BE REQUIRED WHERE A PERMIT HAS BEEN ISSUED BY THE U. S. CORPS OF ENGINEERS UNDER THE "COMMERCE CLAUSE" WHICH GIVES EXCLUSIVE CONTROL OF NAVIGABLE BODIES OF WATERS TO THE FEDERAL GOVERNMENT, THEREFORE, ANY SUCH ACTION BY THE APPELLEE AS HOLDER OF THE EASEMENT WOULD BE UNLAWFUL AND NOT AUTHORIZED BY CONGRESS AND WOULD BE AN OBSTRUCTION TO THE NAVIGATION OF SUCH TURNING BASIN AND AN INTERFERENCE WITH SAME.

SIXTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS CONCLUSION OF LAW NO. THAT THE APPELLEE HAS NO ADEQUATE REMEDY OF LAW OR OTHERWISE FOR THE HARM THREATENED TO BE DONE BY THE APPELLANTS AND IT AND ITS MEMBERS WILL SUFFER IRREPARABLE HARM, DAMAGES AND INJURIES BY VIRTUE OF SUCH INTRUSION IN AND ON SUCH A SMALL AREA AS THE TURNING BASIN, UNLESS THE PROPOSED PROJECT AND DEVELOPMENT ARE ENJOINED, BECAUSE APPELLEE AS THE PRIVATE HOLDER OF THE EASEMENT HAS NO STANDING TO ENJOIN THE ACTIONS OF APPELLANTS ACTING UNDER THE AUTHORITY OF THE PERMIT ISSUED TO THEM BY THE U. S. CORPS OF ENGINEERS WHO, UNDER THE "COMMERCE CLAUSE" HAD THE EXCLUSIVE CONTROL OVER THE PLACING OF STRUCTURES IN THE NAVIGABLE WATERS OF

THE TURNING BASIN TO THE EXCLUSION OF THE EASEMENT RIGHTS CLAIMED BY APPELLEE.

SEVENTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS CONCLUSION OF LAW NOS. I, VI, VII, VIII AND IX, IN HOLDING THAT APPELLANT'S PROPOSED STRUCTURES WITHIN THE TURNING BASIN WOULD BE AN INFRINGEMENT OF APPELLEE'S EASEMENT; THAT THE PUBLIC'S RIGHTS ARE SUBJECT TO APPELLEE'S EASEMENT BECAUSE SUCH HOLDINGS ARE CONTRARY TO LAWS AND STATED POLICY OF THE STATE OF TEXAS AS CONTAINED IN V.A.T.S. NATURAL RESOURCES ACT SEC. 33.

EIGHTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS FINDING OF FACT NO. XI THAT THE APPELLEE HAS NEVER ABANDONED ITS EASEMENT SINCE BY THE RECORD IN THIS CASE IT IS SEEN THAT THE PURPOSE OF THE EASEMENT WAS TO LIMIT THE USE OF THE OVERLYING WATERS IN TRAVELING TO AND THE USE OF THE MARINA THEN IN EXISTENCE, OR TO THE LANDS ADJOINING SUCH BASIN, AND TO LIMIT THE PLACING OF STRUCTURES WITHIN THE BASIN AREA, AND NOT ANY INDICATED USE OF THE BED OF SUCH BASIN WHICH IS OF NO BENEFIT AS CONCERNS THE USE OF THE OVERLYING NAVIGABLE WATER IN SUCH BASIN. WHEN THE OVERLYING WATERS WENT "PUBLIC" THE PUR-

POSE AND OBJECT OF THE 1975 EASEMENT HAD NO FURTHER REASON FOR ITS EXISTENCE AND BECAME DORMANT, AND HAD THE SAME STATUS AS IF ABANDONED, SINCE THE OWNERSHIP OF THE BED OF ANY NAVIGABLE STREAM HAD NO RELATION TO A LIMITATION OVER THE CONTROL TO BE EXERCISED OVER NAVIGABLE WATERS UNDER THE "COMMERCE CLAUSE" BY THE U. S. CORPS OF ENGINEERS.

NINTH POINT OF ERROR

THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT NO. XIII THAT IF THE TURNING BASIN IS BUILT IN ACCORDANCE WITH THE APPELLANT'S PLANS AND SPECIFICATIONS FOR WHICH A PERMIT HAD BEEN ISSUED BY THE U. S. CORPS OF ENGINEERS, THERE WOULD BE A SUBSTANTIAL INCREASE IN THE AMOUNT OF BOAT TRAFFIC IN THE AREA; AND, BOAT STORAGE IN THE TURNING BASIN AREA WILL CAUSE WEAKENING OF THE CHANNEL BULKHEADS, POLLUTION AND DAMAGE TO THE AESTHETICS OF THE TURNING BASIN, ACCELERATION OF THE FILL-IN WHERE THE CHANNEL ENTERS GALVESTON BAY, WILL INCREASE THE NECESSITY OF MAINTENANCE DREDGING AND GENERALLY DEGRADE THE QUALITY OF LIFE FOR THE SUBDIVISION AS A WHOLE BY ATTRACTING A LARGE NUMBER OF PEOPLE IN SUCH A SMALL AREA, CAUSING GREATER ROAD CONGESTION, NOISE AND DISTURBANCE OF THE PEACEFUL AND TRANQUIL ATMOSPHERE WHICH

EXISTS IN THE SUBDIVISION, SINCE ALL OF THE ABOVE FACTORS ARE CONCERNED WITH NAVIGABLE WATERS AND NAVIGATION PROJECTS AND ERECTION OF STRUCTURES THEREON UNDER THE EXCLUSIVE CONTROL OF THE "COMMERCE CLAUSE" AND THE U. S. CORPS OF ENGINEERS AND ARE NOT REACHED BY THE EASEMENT CLAIMED BY APPELLEE.

APPENDIX F

ASSIGNMENTS OF ERROR TO SUPREME COURT OF TEXAS

FIRST ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT WHICH REPRESENTED AN ABUSE OF THE TRIAL COURT'S DISCRETION WHEN IT GRANTED RESPONDENT'S PETITION FOR A PERMANENT INJUNCTION BECAUSE SUCH ARBITRARY ACTION BY THE TRIAL COURT WAS CLEARLY CONTRARY TO THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND THE LAWS OF THE STATE OF TEXAS WHICH PLACES THE SOLE AND EXCLUSIVE CONTROL OVER NAVIGABLE STREAMS OF WATERS IN REGULATORY AGENCIES OTHER THAN PRIVATE PARTIES SUCH AS THE RESPONDENT CLAIMING UNDER AN EXCLUSIVE EASEMENT UNDER NAVIGABLE WATERS.

FIFTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN ITS HOLDING THAT THE USE PERMITTED IN THE INJUNCTION ORDER CALLED "APPROPRIATE USE" IS NOT SUCH A RIGHT THAT THE DISTRICT COURT OR THE COURT OF CIVIL APPEALS COULD LABEL, LIMIT AND RESTRICT BUT IS ONE CONTROLLED BY THE LAWS APPLICABLE TO THE USE OF NAVIGABLE WATERS AND THE COMMERCE CLAUSE AS ADMINIS-

TERED BY THE APPROPRIATE GOVERNMENTAL AGENCIES AND IS NOT DEPENDENT UPON OR SUBJECT TO THE WILL OF PRIVATE OWNERSHIP.

EIGHTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN ITS HOLDING THAT THE IMPROVEMENTS AUTHORIZED TO BE CONSTRUCTED UNDER THE PERMIT HELD BY THE PETITIONERS FROM THE U. S. ARMY CORPS OF ENGINEERS DID NOT PROMOTE THE COMMERCE OF THE STATE ALTHOUGH OTHER AUTHORITIES HOLD THAT THE ERECTION OF PIERS, WHARVES AND LIKE IMPROVEMENTS ALONG THE WATERS ARE IN THE INTEREST OF COMMERCE AND TRADE.

TENTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN ITS HOLDING THAT PETITIONERS CONTENDED THAT THE SUBMERGENCE OF THE TURNING BASIN EFFECTED AN ABANDONMENT OF THE EASEMENT BECAUSE THE EASEMENT DID NOT EXIST AT THE TIME OF THE SUBMERGENCE OR WHEN THE WATERS BECAME PUBLIC, AND THE GIST OF PETITIONERS CONTENTION WAS THAT THE USE OF THE OVERLYING PUBLIC WATERS OF THE BED OF THE TURNING BASIN RENDERED SUCH EASEMENT DORMANT BECAUSE ANY USE THEREOF WOULD INTERFERE WITH THE USE BY THE PUBLIC OF THE OVERLYING PUBLIC WATERS.

TWELFTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S CONCLUSION OF LAW NO. I, THAT EVEN THOUGH THE PETITIONERS HAVE OBTAINED A PERMIT FOR THE CONSTRUCTION OF THE IMPROVEMENTS REFERRED TO IN THE FINDINGS OF FACT, THE PERMIT IS NOT CONTROLLING SINCE, ALTHOUGH THE PERMIT MAY HAVE BEEN REQUIRED BY THE CORPS OF ENGINEERS, CONSENT BY THE RESPONDENT WOULD HAVE ALSO BEEN REQUIRED SINCE THE UNDERLYING LANDS WERE NOT PUBLIC LANDS, OR IF THEY HAD BECOME PUBLIC LANDS, THE PUBLIC'S RIGHTS ARE SUBJECT TO RESPONDENT'S EASEMENT TO THE LAND BENEATH THE WATER OF THE TURNING BASIN, BECAUSE SUCH CONSENT OF THE RESPONDENT IS NOT REQUIRED WHERE A PERMIT HAS BEEN ISSUED BY THE U. S. CORPS OF ENGINEERS UNDER THE "COMMERCE CLAUSE" WHICH GIVES SOLE AND EXCLUSIVE CONTROL OF NAVIGABLE BODIES OF WATER TO THE FEDERAL GOVERNMENT, AND THE STATE GOVERNMENTS, THEREFORE, ANY SUCH ACTION BY THE RESPONDENT AS HOLDER OF THE EASEMENT WOULD BE UNLAWFUL AND NOT AUTHORIZED BY CONGRESS AND WOULD BE AN OBSTRUCTION TO THE NAVIGATION OF SUCH TURNING BASIN AND AN INTERFERENCE WITH USE OF SAME.

FIFTEENTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN

AFFIRMING THE TRIAL COURT'S FINDING OF FACT NO. 1 THAT THE RESPONDENT WAS THE SOLE OWNER OF A PERPETUAL, IRREVOCABLE AND EXCLUSIVE EASEMENT AND RIGHT-OF-WAY WHICH INCLUDED THE FULL, FREE AND UNINTERRUPTED USE OF ALL OF THE TURNING BASIN AND THE WATERS OVERLYING SAID TURNING BASIN, COVERING 8.27172 ACRES, IN THAT THE RECORD SHOWS THAT THE WATERS COVERING SAID TURNING BASIN WERE NAVIGABLE WATERS, AND HAD BEEN SINCE 1963 WHICH WAS PRIOR TO THE CREATION OF THE EASEMENT CLAIMED BY RESPONDENT, ALL OF WHICH PRECLUDED THE RESPONDENT FROM EXERCISING CONTROL OVER SUCH NAVIGABLE WATERS, SINCE THE CONTROL WAS VESTED IN THE U. S. CORPS OF ENGINEERS BY THE "COMMERCE CLAUSE" OF THE U. S. CONSTITUTION AND IMMUNE FROM THE INFRINGEMENT BY THOSE HOLDING PRIVATE RIGHTS.

SEVENTEENTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN ITS HOLDING THAT THIS CASE SHOULD BE TRIED ON THE THEORY THAT THE PROPERTY WAS "DRY LAND" AND APPLIED RULES SO APPLICABLE INSTEAD OF TREATING THE EASEMENT CLAIMED BY RESPONDENT AS BEING UNDER NAVIGABLE WATERS AND THEREFORE SUBJECT TO NAVIGABLE WATER DOCTRINES AND RULES.

NINETEENTH ASSIGNMENT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN ITS HOLDING THAT THE RESPONDENT COULD EXERCISE RIGHTS IN THE RESTRICTION OF STRUCTURES ERECTED THEREIN AND THE CONTROL OF MARINE TRAFFIC, UNDER ITS EASEMENT UNDER NAVIGABLE WATERS WITHOUT REGARD TO THE PUBLIC CHARACTER OF SUCH WATERS AND EVEN THOUGH SUCH EASEMENT RIGHTS WERE CREATED AFTER THE BED OF THE TURNING BASIN WAS SUBMERGED BENEATH NAVIGABLE WATERS.

APPENDIX G

THE STATE OF TEXAS §

COUNTY OF GALVESTON §

KNOW ALL MEN BY THESE PRESENTS:

THAT 7500 BELLAIRE CORP., a Texas corporation (also known as "7500 Bellaire Corporation"), with its principal place of business in the County of Harris, State of Texas (herein called "Grantor"), for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable considerations paid to Grantor by *CARY C. WHITE, TRUSTEE*, of Harris County, Texas (herein called "Grantee"), the receipt and sufficiency of which is hereby acknowledged, does hereby *GRANT and CONVEY unto Grantee, his successors and assigns, a perpetual, EXCLUSIVE easement and right of way for the full, free and uninterrupted use of all the following described tract of land situated in Galveston County, Texas, and the waters overlying said tract of land, to-wit:*

> A tract of land containing 8.27172 acres, more or less, out of Division 4, Section 13, of the Hall and Jones Survey, Abstract No. 121, Galveston County, Texas, said 8.27172 acre tract of land being more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes;

together with the full and free right of ingress and egress over and across said land and the waters overlying said land, to and from Grantee's land unto Grantee, his successors and assigns and to Grantee's tenants, employees, agents, customers, guests, visitors or invitees, and for any and all purposes connected with the full and com-

plete use by Grantee, his successors and assigns of the marina and related facilities now or hereafter situated on Grantee's land.

TO HAVE AND TO HOLD said easement and right of way unto Grantee, his successors and assigns in accordance with the terms and provisions hereof forever; and Grantor does hereby bind itself, its successors and assigns to warrant and forever defend said easement and right of way unto Grantee, his successors and assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

EXHIBIT "A"

A 8.27172 ACRE TRACT, MORE OR LESS, OUT OF DIVISION 4, SECTION 13, OF THE HALL AND JONES SURVEY, ABSTRACT NO. 121, GALVESTON COUNTY, TEXAS, SAID TRACT BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS, TO-WIT:

Commencing at the Southwest corner of Terramar Beach, Section 3, according to the map or plat recorded in Volume 1616, page 89 in the Office of the County Clerk of Galveston County, Texas; THENCE from said beginning point, along the West line of a 3.88204 acre tract S 31° 22′ 35″ E, a distance of 100.00 feet; S 31° 33′ 16″ E, a distance of 77.03 feet, S 41° 40′ 17″ E, a distance of 78.18 feet to a point for corner being the Northeast corner of a 1.82849 acre Marina Tract; THENCE along the Northerly line of said 1.82849 acre tract S 57° 35′ W, a distance of 405.62 feet to a point for curve; THENCE in a Westerly direction around a curve to the right having a radius of 67.26 feet, an arc length of 26.32 feet to a point for tangent; THENCE S 80° 00′ W, a distance of 193.79 feet to a point for corner being the Northwest corner of said 1.82849 acre tract; THENCE S 10° 00′ E, along the West line of said 1.82849 acre tract, a distance of 11.86 feet to a point for corner in the Easterly line of a 12.91081 acre tract; THENCE along the Easterly line of said 12.91081 acre tract, N 66° 02′ 17″ W, a distance of 87.06 feet, N 60° 55′ 05″ W, a distance of 214.58 feet, N 0° 22′ 41″ E, a distance of 256.20 feet, N 55° 03′ 58″ W, a distance of 119.17 feet to a point for corner being the Northeast corner of said 12.91081 acre tract, THENCE N 58° 48′ 04″ E, a distance of 500.24 feet to a point for corner in the Westerly line of Terramar Beach, Section 3; THENCE along the West line of Terramar Beach, Section 3, S 32° 25′ E, a distance of 101.86 feet, S 32° 03′ 58″ E, a distance of 82.99 feet and S 31° 33′ 44″ E, a distance of 100.01 feet to the place of beginning and containing 8.27172 acres, more or less.

APPENDIX H

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Capitol Station
Austin, Texas 78711

March 9, 1983.

Mr. Fred A Lange, Attorney
1938 Bank of the Southwest
Houston, Texas 77002

Mr. Robert M. Moore, Attorney
Moore Professional Building
7511 Broadway
Galveston, Texas 77551

Dear Sirs:

Motion for rehearing in the case of C. ED CARRITHERS ET AL. v. TERRAMAR BEACH COMMUNITY ASSN., No. C-1066 was this day overruled.

Motion to stay issuance of mandate is granted.

Very truly yours,

/s/ GARSON R. JACKSON
Garson R. Jackson, Clerk